

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

HONORABLE STANLEY BLUMENFELD, JR., U.S. DISTRICT JUDGE

SANTA CLARITA VALLEY WATER AGENCY,

Plaintiff,

v.

WHITTAKER CORPORATION, et al.,

Defendants.

Case No.

CV 18-6825 SB (RAOx)

Volume 18

(Pages 1964 – 2018)

REPORTER'S TRANSCRIPT OF TRIAL PROCEEDINGS

TRIAL DAY 9: P.M. SESSION - PART 2

WEDNESDAY, DECEMBER 1, 2021

3:11 P.M.

LOS ANGELES, CALIFORNIA

MYRA L. PONCE, CSR 11544, CRR, RPR, RMR, RDR

FEDERAL OFFICIAL COURT REPORTER

350 WEST 1ST STREET, ROOM 4455

LOS ANGELES, CALIFORNIA 90012

(213) 894-2305

1 **APPEARANCES OF COUNSEL:**

2
3 **FOR THE PLAINTIFF:**

4 NOSSAMAN, LLP
5 BY: BYRON P. GEE
6 BY: RAVEN MCGUANE
7 BY: PATRICK J. RICHARD
8 BY: FRED FUDACZ
9 Attorneys at Law
10 777 South Figueroa Street, 34th Floor
11 Los Angeles, California 90017
12 (213) 612-7800

13 NOSSAMAN, LLP
14 BY: ILSE CHANDALAR SCOTT
15 Attorney at Law
16 50 California Street, 34th Floor
17 San Francisco, California 94111
18 (415) 398-3600

19
20 **FOR THE DEFENDANT WHITTAKER CORPORATION:**

21 EDLIN, GALLAGHER, HUIE & BLUM
22 BY: MICHAEL E. GALLAGHER, JR.
23 BY: FRED M. BLUM
24 BY: DANIEL ERIC TROWBRIDGE
25 Attorneys at Law
1 500 Washington Street, Suite 700
2 San Francisco, California 94111
3 (415) 397-9006

4
5 **ALSO PRESENT:**

6 MATT STONE
7 SCOTT FRYER
8 RON BEATON
9 ERIC LARDIERE

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3 EVIDENCE
4 PG.

NUMBER DESCRIPTION

5 (NONE OFFERED.)
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1 WEDNESDAY, DECEMBER 1, 2021; 3:11 P.M.

2 LOS ANGELES, CALIFORNIA

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4 (Out of the presence of the jury:)

03:11PM 5 THE COURT: Back on the record. And all are present
6 who were present before the break.

7 Mr. Blum, I believe you were going to be saying
8 something else. Or have you completed your response to the
9 Court's observation about Mr. Hokkanen's testimony?

03:12PM 10 MR. BLUM: Your Honor, I'm trying to remember what I
11 said, honestly.

12 THE COURT: Let me just -- that's fine. It's late.
13 Let me just tell you what I recall. And I took particular note
14 of this because of the conversation that we had concerning
03:12PM 15 Mr. Hokkanen and his ability to identify other potential
16 sources is that he testified, as I recall, that what he would
17 basically do, if he were looking to identify other sources, is
18 that he would actually conduct an investigation to see who was
19 disposing of what chemicals in the nearby area as a starting
03:13PM 20 point to then do further analysis to see whether they
21 potentially could be a source. And he made it fairly clear he
22 didn't do any of that.

23 My takeaway from his deposition in this -- his
24 testimony, rather, in this regard is that he said essentially
03:13PM 25 it's not Whittaker. And so if it's not Whittaker, well, by

1 definition, it's somebody else.

2 MR. BLUM: Well, Your Honor, I think that's true.

3 Again, you asked us to give you specifically what we were
4 asking, what we were asking the Court. And what we identified
03:13PM 5 in the pleading was specifically the mall wells and no other
6 location.

7 THE COURT: And so tell me how you would present
8 this to the jury by way of an instruction, that SIC and who
9 were negligent or at fault?

03:14PM 10 MR. BLUM: Those parties that -- whose -- whose
11 contamination was found in the mall wells.

12 THE COURT: But you're not able to identify it other
13 than being Whittaker and I'm not aware of allowing by this
14 instruction an apportionment that would identify someone else
03:14PM 15 in that sort of nondescript way. That's what I'm struggling
16 with, Mr. Blum.

17 MR. BLUM: I understand where the Court is. And
18 just to be clear, we're only talking about the negligence
19 claims here because I think it's different when we get to the
03:14PM 20 stuff that the Court has to deal with on CERCLA and stuff like
21 that.

22 The -- we're allowed to seek apportionment if we can
23 either name or describe with sufficient particularity the
24 party. And I think we -- I think, since we have a -- a
03:15PM 25 specific geographical area, we have specific types of

1 contamination, and there is significant evidence that it's not
2 us and that it was then drawn into V-201 by the pumping system
3 that was in place, that, I think, is enough -- enough of a
4 particular description to put it before the jury.

03:15PM 5 I think the Court is right in terms of most of the
6 way it described the evidence, I just think we just -- we may
7 disagree on what the legal significance is.

8 THE COURT: And are you able to provide the Court
9 with any authority that would support this? I'm happy to
03:15PM 10 provide it if the law supports it.

11 MR. BLUM: Your Honor, right now I don't have that
12 authority. I would like to be able -- if I have, to come up
13 with it in the morning, but I understand we're in a time
14 crunch.

03:16PM 15 THE COURT: Well, what I will allow you to do is
16 if -- I know the parties have briefed this. But if you
17 actually have some more specific authority that you want to
18 cite to the Court, you can send the Court to chambers e-mail,
19 copying Mr. Richard, the citation, and I'll take a look at it.

03:16PM 20 I'm just not aware of the Court's legal ability to
21 essentially say, since it -- a party says -- has evidence that
22 it wasn't them, it therefore must have been somebody else, and
23 a jury then can allocate responsibility to someone else who
24 they know nothing about. They don't know how they were
03:16PM 25 negligent, what they did, or at least they don't know who the

1 party potentially even was.

2 MR. BLUM: Your Honor, I mean, let's just play out
3 what the Court said, and let's assume that the jury believes
4 we're not responsible for the mall wells. What does the jury
03:17PM 5 do? It can't apportion it -- it can't give it to us because it
6 believes that we didn't do it. It's not SIC, and it's not the
7 plaintiff. So what do I do with this chunk of liability that
8 they believe none of the parties here is responsible for?

9 THE COURT: Let's talk about the practicality of it
03:17PM 10 because I think that may address it. What does that translate
11 into? So what is -- let's say the jury were to say, yeah,
12 there's some other source at the mall well -- at the mall
13 wells. What does that translate into? How do they make any
14 kind of rational allocation in that instance?

03:17PM 15 MR. BLUM: Well, one way is, if they decide that,
16 for instance, let's say they decide that we're liable for
17 Saugus 1 and Saugus 2 but not V-201. They can say -- or that
18 we -- that our contribution to it was infinitesimal and that
19 the only other known source would be the -- the mall wells and
03:18PM 20 the pumping. They can assess 95 percent of what they believe
21 is a liability for V-201. I don't know how that works out with
22 the total calculations, but juries do that all the time.

23 THE COURT: All right. One last thing before I turn
24 to Mr. Richard on this. What's the real practical effect of
03:18PM 25 this? That is to stay --

1 MR. BLUM: Well, less.

2 THE COURT: That's what I'm asking is it's joint and
3 several liability at least with respect to economic damages;
4 right?

03:18PM 5 MR. BLUM: Yes.

6 THE COURT: So you would pay less on an
7 apportionment basis for noneconomic harm; correct?

8 MR. BLUM: Yes.

9 THE COURT: Is there noneconomic harm here?

03:18PM 10 MR. BLUM: No.

11 THE COURT: So what is the practical significance of
12 this?

13 MR. BLUM: Um, Your Honor, funny thing about it,
14 that's what Mr. Gallagher and I were talking about last night.

03:19PM 15 I don't know, Your Honor. This is -- this is not a hill that I
16 want to die on.

17 THE COURT: Look, can I ask you to maybe think about
18 this and see whether you even want an apportionment of
19 responsibility where you're going to be spending your time
03:19PM 20 arguing to the -- to the jury that you should allocate this
21 much to this party, this much to that party?

22 I'm going to give you this apportionment of
23 responsibility instruction. It's just going to be if you want
24 it. It's just going to be a question of whether I'm including
03:19PM 25 these -- the mall well contributors. And, frankly, I think

1 we're spending a lot of time on what's probably an absolute
2 academic issue because I can't see how this practically matters
3 in a case involving complete economic harm.

4 MR. BLUM: I will -- Mr. Gallagher and I will talk
03:19PM 5 about it, and we will -- if we decide to withdraw it, we will
6 send an e-mail to the Court.

7 THE COURT: All right. And, Mr. Richard, I will
8 hear from you if you wish to because I'm not likely going to be
9 able to give more time to discuss the issues.

03:20PM 10 MR. RICHARD: I just want the record clear I do not
believe the evidence, after Mr. Hokkanen's testimony, supports
giving this instruction at all. I -- and also -- so I'm -- I
just want the record clear I don't think the instruction should
be given at all, and I don't think further argument at this
point is necessary.

16 THE COURT: That's fine. I am fairly persuaded that
17 there's evidence that SIC may be the cause of the VOCs, not
18 just from Mr. Hokkanen. There's been other testimony
19 concerning SIC potentially being a source.

03:20PM 20 But in any event, enough on that because I -- I
21 think we've taken that as far as it needs to be taken.

22 MR. BLUM: Your Honor, on a completely different
23 issue, I talked to Mr. Richard at the break. The plume maps
24 that Mr. Hokkanen relied upon, we've agreed that they could be
25 entered into evidence, and I'll be providing them to the clerk,

1 to Mr. Cruz.

2 THE COURT: Very well. And the Court accepts the
3 stipulation.

4 MR. BLUM: Thank you.

03:21PM 5 THE COURT: With regard to damage to real property,
6 this is the issue, I believe, of diminution in value. And I
7 have had a chance to review the parties' supplemental briefing
8 on this.

9 It seems to the Court that there has been no
03:21PM 10 evidence of diminution in value of the property, nor,
11 incidentally, am I yet persuaded that there's been evidence of
12 diminution in value of the groundwater, even assuming that was
13 an appropriate evaluation or valuation point.

14 The parties agree -- and I think correctly
03:22PM 15 legally -- that it is Whittaker's burden to demonstrate
16 diminution in value.

17 So I will hear from the defense, if you wish to be
18 heard, as to where there is evidence of diminution in value.

19 MR. BLUM: Your Honor, do you mean evidence of no
03:22PM 20 diminution of value?

21 THE COURT: I'm sorry. That there's evidence of
22 either no diminution in value or some diminution in value that
23 is less than the restoration damages.

24 MR. BLUM: Your Honor, the evidence is let's -- if
03:22PM 25 we take what was testified to by Mr. Alvord about what the

1 property interest is, the evidence is that that hasn't been
2 affected in any way. The machinery works. The -- everything
3 is drawing fine. That -- if you look at the water as a result
4 of the VOCs, it's --

03:23PM 5 THE COURT: No. I'm -- I'm very -- I think I'm
6 familiar with Whittaker's position that essentially -- and I
7 don't mean to make light of this.

8 MR. BLUM: I understand.

03:23PM 9 THE COURT: But no harm, no foul. That is to say
10 that, even if we were responsible for the contamination,
11 it's -- it's clear that the VOCs are at such a level that it's
12 not causing problems in being able to serve the water below the
13 MCLs or even the MCL equivalence. And there's been no evidence
14 of damage, as you say, to the wells and things of that nature.

03:23PM 15 But it seems to me that you're making a supposition
16 that the Court is not clear is correct, which is you're
17 suggesting that that is the valuation of groundwater. You're
18 saying there's been no harm to the groundwater that's material
19 and, therefore, there's been no diminution in value, assuming
03:24PM 20 it's groundwater as opposed to assuming it's land.

21 MR. BLUM: Well, Your Honor, we actually believe
22 it's land. It's not groundwater. But we argued both because
23 that's what we believe the plaintiff has been arguing. Because
24 I think the land itself I think is the key, is the thing that
03:24PM 25 sort of allows the groundwater claim to go forward.

03:24PM

1 And in terms of the land, the only evidence is
2 Mr. Alvord talking about the pumping systems and we have -- and
3 it's clear here that those pumping systems have not been
4 affected one iota, that there is nothing wrong with any of the
5 systems, that the VOCs haven't prevented them from pumping
6 anything. I think the jury can infer no -- no diminution in
7 value from that evidence.

8 THE COURT: What evidence is there of land valuation
9 affected by contamination?

03:25PM

10 MR. BLUM: Your Honor, if the number is zero, you
11 don't need what the value is.

12 THE COURT: But that presupposes what you have to
13 prove, doesn't it?

03:25PM

14 MR. BLUM: Your Honor, all we have to go -- all we
15 have to -- in order to go forward with it, we just have to
16 prove that there is some evidence to support zero, substantial
17 evidence to support no diminution in value.

18 THE COURT: But tell me how do you value land? How
19 is land valued?

03:25PM

20 MR. BLUM: One, it can be valued by the cost of
21 repair. That's a proper way to value -- to value diminution in
22 value. If it only costs ten cents to clean it up, it's lost
23 ten cents in value.

24 THE COURT: But you're not claiming cost of repair.
25 You're saying that the jury shouldn't look at the cost of

1 repair which is restoration damages. You're saying that it's
2 diminution in value of the land.

3 MR. BLUM: Restoration damages is not -- if the
4 issue was how much does it cost to restore the land, there is
03:26PM 5 zero evidence the land is contaminated. If that's -- if that's
6 the standard that the Court uses, the Court should dismiss
7 plaintiff's case because there's zero evidence on restoration
8 of land here. All of the evidence goes to restoration of
9 groundwater.

03:26PM 10 THE COURT: Isn't -- isn't there evidence that the
11 VOCs have made their way into the soil and from the soil have
12 gotten into the groundwater?

13 MR. BLUM: The -- yeah. But that's at the Whittaker
14 site, not on the land that plaintiff owns. All of the evidence
03:26PM 15 of movement is at the Whittaker site. There is zero evidence
16 that there is any contamination of any of the land that
17 plaintiff claims they own. And we don't even know what -- when
18 I say own, I'm inferring it's owned. We don't know if it's a
19 lease. We don't know if it's a license. We don't know if it's
03:27PM 20 an easement. And that's why we believe -- we actually believe
21 that the claim of ownership is too vague to substantiate
22 ownership.

23 THE COURT: So you're saying that there is no
24 evidence of offsite migration of VOCs from the Whittaker site?

03:27PM 25 MR. BLUM: Oh, no. There's tons of it. But has any

1 of it ended up on plaintiff's land? I don't know. There's
2 been no evidence it has.

3 For instance, Your Honor, if they don't own the land
4 right -- that touches the groundwater, you can't infer that
03:27PM 5 there's contamination to the land. If all they own is what's
6 on the surface, how has the contamination moved 40 or 50 feet
7 up? There's no evidence of it.

8 THE COURT: But let's assume there is evidence. If
9 there is evidence that there was offsite migration of
03:27PM 10 contaminants that polluted or affected the plaintiff's
11 property, then the Court would need to have some valuation
12 evidence as to the impact of that contamination on their
13 property.

14 MR. BLUM: I would agree. But there's not -- that
03:28PM 15 evidence doesn't exist, Your Honor.

16 THE COURT: The evidence of contamination of the
17 plaintiff's property doesn't exist.

18 MR. BLUM: Correct. And this is what I will say.
19 What is the plaintiff -- what is the ownership interest the
03:28PM 20 plaintiffs have? Nobody knows. So how can the Court say that
21 the property has been contaminated where we don't know what the
22 ownership interest is?

23 For instance, if it's a use easement, clearly the
24 VOCs haven't interfered with the use easement. If it's a
03:28PM 25 license, that's not enough.

1 THE COURT: All right. So you're suggesting that
2 Mr. Alvord didn't provide sufficient evidence as to -- as to
3 property ownership.

4 MR. BLUM: Yes, sir. Yes. And this would be the
03:28PM 5 last point. When you look at the evidence for the -- okay.
6 When you look at the evidence, let's assume the land is the
7 key. There's no evidence of rest -- of cost of restoration of
8 the land. All of the evidence goes to restoration of the
9 groundwater.

03:29PM 10 THE COURT: All right. Let me hear from
11 Mr. Richard, please.

12 MR. RICHARD: Yes, Your Honor. Thank you.

13 I thought the instruction we were discussing was
14 damage to real property, and at times it seemed like you and
03:29PM 15 counsel were speaking at cross purposes.

16 So on that instruction, the question is whether
17 there should be any reference to diminution in value, and the
18 Court has correctly pointed out the parties agree that burden
19 falls to defendant, where there is not that evidence, then that
03:29PM 20 part of the instruction is not given. So that's how I see that
21 issue on this instruction.

22 The other comments we've heard over and over again,
23 this slicing and dicing that's contrary to the law that we've
24 cited. The *Starrh* case, the *City of Pomona* Ninth Circuit case.
03:30PM 25 So I'm not --

1 THE COURT: Mr. Richard, you don't have to persuade
2 me.

3 MR. RICHARD: Okay.

4 THE COURT: I have read that authority, and I have
03:30PM 5 indicated that you are correct about it and that Mr. Blum, in
6 my judgment, is incorrect about it.

7 But we also had a discussion about what the evidence
8 is to support the -- the *Starrh* type of instruction or analysis
9 that you're entitled to restoration damages because your
03:30PM 10 property, your client's property, has been damaged through the
11 introduction of these contaminants.

12 MR. RICHARD: Right. And the *City of Pomona* case
13 very clearly said that contamination of groundwater provides
14 sufficient standing in that regard. So I just wanted to be
03:30PM 15 clear on this instruction or which issue we're dealing with.

16 THE COURT: Is there evidence that -- first of all,
17 that the water agency owns the property?

18 MR. RICHARD: The evidence is that, for all their
19 wells, they either own it or have the exclusive right to use
03:31PM 20 it. And so that is --

21 THE COURT: Just the wells or the property
22 surrounding --

23 MR. RICHARD: No, he said in the property that the
24 wells sit on. He said, for all of our wells, the water agency,
03:31PM 25 both Valencia and then the new water agency after the merger,

1 either owns the land or has an exclusive right to use the land.

2 And he didn't go well-by-well. He said for all the wells.

3 And that, in addition to Keith Abercrombie's
4 testimony about the piping and the water agency, is more than
03:31PM 5 sufficient to meet that jury instruction, which is a different
6 jury instruction.

7 THE COURT: And so now what about the argument that
8 there's no evidence that anything other than the groundwater
9 has been affected by the contaminants?

03:31PM 10 MR. RICHARD: Yeah. And I think two things on that.

11 One, we've heard from several of the geologists saying that
12 they're seeking equilibrium, the contamination doesn't just
13 stay in the groundwater. It does transport back and forth
14 between the surrounding land and the groundwater itself. We've
03:32PM 15 heard testimony that it's not a river, it actually is part of
16 the land, and that those contaminants cling and go back and
17 forth between the soil and the water. That sort of
18 distinction, though. So yes, the evidence supports that, and
19 we can easily find that.

03:32PM 20 But too, the Ninth Circuit's been clear. That's
21 sort of parsing, you know, do the particles of the
22 contamination stay on the land or stick to the water is
23 absolutely unnecessary. We absolutely have standing to sue for
24 the groundwater contamination. But in this case, we also have
03:32PM 25 that interesting evidence that the contamination sticks to the

1 soil, not just to Whittaker's property but at the property
2 beneath our well.

3 THE COURT: Is there evidence beyond that as to the
4 contamination affecting the property other than the
03:33PM 5 groundwater?

6 MR. RICHARD: Affecting the property? I think the
7 effect is via the groundwater.

8 THE COURT: So the introduction of the VOCs and the
9 perchlorate all come through the groundwater, and then through
03:33PM 10 the groundwater, the contaminants stick to or transfer to the
11 soil. That is the extent of the evidence with regard to
12 contamination of the water agency's property.

13 MR. RICHARD: Well, no. I mean, it's the -- when
14 you say property, that's a different question. I thought we
03:33PM 15 were talking about soil.

16 The groundwater provides -- contamination of
17 groundwater under *Starrh and Starrh* and *City of Pomona* provides
18 all the standing we need on these three claims. So I was just
19 answering Your Honor's question about is there evidence to show
03:34PM 20 contamination from the soil as distinguished from the
21 groundwater in the soil.

22 THE COURT: Well, construe my question, if you
23 would, please, as property. So is there something other than
24 soil that these contaminants affected your client's --

03:34PM 25 MR. RICHARD: Yes.

1 THE COURT: -- property?

2 MR. RICHARD: Sure. As the water -- I believe the
3 cases -- we have the right to pump and use the water, and when
4 we do that, it becomes the property of the agency.

03:34PM 5 THE COURT: I understand. There's water. There's
6 soil. Is there anything else that you're claiming the evidence
7 shows the contamination affected?

8 MR. RICHARD: I'm -- I don't think we -- if I
9 thought about it, Your Honor, I'm sure it's in the piping and
03:34PM 10 throughout the distribution system, and that's also property.
11 But no, I think we fully addressed it in those components.

12 THE COURT: All right. I'm going to take this
13 matter under submission. But I am inclined to accept the
14 instruction as presented by the plaintiff. I'm not convinced
03:35PM 15 yet, but I will reflect further that there is any evidence of
16 diminution of value to the land. I think the -- the argument
17 doesn't fit the legal principle here that I've heard from
18 Whittaker.

19 MR. RICHARD: Thank you.

03:35PM 20 THE COURT: Let me move on to the next issue which
21 is loss of use of real property. And I'll hear from you,
22 Mr. Blum, if you wish to be heard on this. I'm not sure that I
23 really understand the basis of the objection to this
24 instruction. It seems it's a fairly standard loss of use
03:35PM 25 instruction just modified to fit -- fit the facts of this case.

1 MR. BLUM: Your Honor, I'm just finding the
2 instruction.

3 THE COURT: You're fine with the instruction? Oh,
4 you're looking at it.

03:36PM 5 MR. BLUM: I'm just finding the instruction.

6 THE COURT: That's fine. All right.

7 MR. RICHARD: It's No. 58.

8 THE COURT: And, for the record, while you're taking
9 the lectern, it simply says, "To recover damages for the loss
03:36PM 10 of use, SCV Water must prove the reasonable cost to repurchase
11 placement water for the time when it could not use its own
12 wells." Isn't that a permissible consequential damage
13 instruction?

14 MR. BLUM: The only issue -- yes, Your Honor. The
03:36PM 15 only thing I would ask is, if the title of it goes to the jury,
16 the title is wrong because we're not dealing with real
17 property. But that's okay. Whatever the Court wants to do,
18 we'll submit.

19 THE COURT: All right. I'll just indicate it as
03:37PM 20 loss of use.

21 And the next is plaintiff's property interest. And,
22 once again, I'll hear from you, Mr. Blum, on this. But it
23 seems like this is just the issue we seem to be going round and
24 round on. And I thought I had decided this issue. I know not
03:37PM 25 in a way that you're pleased with, and I know you think I'm

1 contradicting Judge Wu's ruling, which I'm not. But haven't --
2 hasn't the Court already decided this issue?

3 MR. BLUM: Your Honor, this has -- I don't think it
4 has anything to do with -- with -- with that issue. I think
03:37PM 5 the -- the type of interest plaintiff says they own is
6 something the jury needs to consider when there's -- when
7 they're trying to determine what has been the invasion of their
8 rights. How can the jury decide that there's been an invasion
9 of the plaintiff's property rights without knowing what those
03:38PM 10 rights are?

11 THE COURT: But isn't that a factual question?
12 There's going to be instruction about they have to prove, at
13 least for certain claims, that there's been a trespass on their
14 property and the like. Isn't that just going to be a matter of
03:38PM 15 factual argument?

16 MR. BLUM: Your Honor, no. The facts -- I don't --
17 the issue is, for instance -- and, actually, if they -- if they
18 owned the property and they were using it to water their own
19 land, their rights would be -- would be greater than they are
03:38PM 20 if they're just using the water to sell. And the rights that
21 they're saying they're interfered with are their -- are their
22 appropriative rights. That's it.

23 So they can't -- other than if they can prove damage
24 to their own property, which, you know, the jury will decide
03:39PM 25 whether or not there's sufficient evidence, they have to prove

03:39PM

1 damage to the rights of use. And -- and the issue is -- the
2 question is when do those rights have to be damaged? And what
3 the case law says -- and this is one in which the cases cited
4 by Mr. Peter have no application because we don't talk about
5 it -- is when does the damage have to occur? If it's a factory
6 right, it has to occur after they actually use the water.

03:39PM

7 THE COURT: And didn't the Court already rule
8 against Whittaker on this argument? Because the Court has
9 concluded that, if they can demonstrate that they have a
10 property interest in the soil, the surface, or the subsurface
11 and that that has been impacted, then they can demonstrate
12 potentially restoration damages, although as reflected in the
13 *Starrh and Starrh* case -- and that's S-t-a-r-r-h -- they have
14 to make a demonstration to the -- to the jury that, in fact,
15 it's reasonable, that the restoration costs are reasonable and
16 there are various factors.

03:40PM

17 But aren't you continuing to push back on the
18 Court's reading of *Starrh and Starrh*?

03:40PM

19 MR. BLUM: Your Honor, first of all, if we want to
20 preserve our record, unfortunately we have no -- we have no
21 option.

03:40PM

22 THE COURT: That's fine, but you can tell me that's
23 what you're doing. You can tell me, Judge Blumenfeld, based
24 upon your ruling, you shouldn't give this instruction, but your
25 ruling is incorrect and we have -- we object to it.

1 MR. BLUM: Your Honor, I -- with respect to the
2 Court, I do think your ruling was incorrect, but we're not -- I
3 don't want to re-argue it.

4 THE COURT: I understand that, and you have clearly
03:40PM 5 preserved that. What I need to figure out, though, is are you
6 in a sense trying to go at it again with an instruction, or are
7 you, as you just suggested, really just seeking to preserve
8 your objection?

9 MR. BLUM: Both, Your Honor. We believe, in order
03:41PM 10 for them to claim -- the ability to claim the damage is
11 different from the triggering point. Yes, under your rulings,
12 they could claim the damage. We still believe the trigger for
13 that damage is at the time they use the water for -- and that's
14 the point.

03:41PM 15 THE COURT: Isn't it the case that if -- let's say
16 they just said they weren't going to use water -- they weren't
17 a water supply company -- but they just said, look, this --
18 this contamination has affected our property. Right? And all
19 the evidence that they presented was the evidence of absorption
20 and that somehow there's contamination that has now made its
21 way into the soil, there subsurface of their property. They
22 could still make this argument to the jury, couldn't they,
23 except that perhaps they should lose.

24 MR. BLUM: Your Honor, it comes down to the point
03:42PM 25 that we were talking about in the last -- one of the last

03:42PM

1 instructions. If -- are they claiming that the damage is
2 damage to their property or damage to the water? And what they
3 seem to be is the only -- the damage to the property is in a
4 sense very small, if any. All they're really claiming and all
5 the evidence for restoration relates solely to damage to the
6 water.

03:42PM

7 THE COURT: Well, but isn't that because they happen
8 to use this property for that purpose and doesn't that just go
9 to the reasonableness analysis that the jury is going to have
10 to decide?

03:42PM

11 MR. BLUM: Yes. But what the cases that we cite in
12 this instruction is when is that damage triggered? And -- and,
13 Your Honor, I'm -- it's been a long day for everybody. I would
14 just submit on it. I think we've -- we understand -- everybody
15 understands each other's points.

03:43PM

16 THE COURT: Very well. All right. Then let's --
17 and, actually, let me just very briefly hear a response because
18 I am going to take the matter under submission. And I hope to
19 get -- if not all of the instructions, most of these
20 instructions to you, as I indicated, this evening.

03:43PM

21 MR. RICHARD: I don't have much to add other than,
22 as soon as the Court denied the motion on the restoration
23 damages, the in limine motion and the motion for
24 reconsideration, we received a number of instructions trying to
25 resuscitate that issue, and this is one of them.

1 So I've argued this, and I don't need to add
2 anything to the Court's -- I think the Court understands the
3 issue better than I do. So I'm going to sit down.

03:43PM 4 THE COURT: Well, one question, though, in that
5 regard. Is it a correct proposition, legal proposition, that,
6 once you can demonstrate damage to the subsurface -- let's
7 exclude the water -- the subsurface, the soil, that that is
8 sufficient for you to seek restoration damages. And then the
9 question is whether those restoration damages are reasonable.
03:44PM 10 And in this context, since you happen to -- or your client uses
11 the property for water supply, that is a factor that simply
12 gets considered in the reasonableness of the restoration damage
13 request.

14 MR. RICHARD: And that's exactly right, Your Honor.
03:44PM 15 And the cases we cited, they are case specific. What are the
16 restoration? Is it damage to your home, damage -- and so it's
17 case specific. And that's exactly right, that it goes to the
18 reasonableness of the restoration damages. And that's an
19 evidentiary, you know, question for the jury in this case.

03:44PM 20 THE COURT: All right. Why don't you remain there
21 for negligence per se.

22 MR. RICHARD: Oh, because that's not my issue,
23 Your Honor.

24 THE COURT: Then let me hear from you on this one,
03:44PM 25 Mr. Gee. And, Mr. Gee, the majority of the cases that I have

1 seen suggest that RCRA is not an appropriate statute to allow
2 for negligence per se. Is that a fair characterization of the
3 case law on this?

4 MR. GEE: Well, we did cite to a case that basically
03:45PM 5 reflects the property use of RCRA and negligence per se, which
6 is that it is evidence of negligence by virtue of the violation
7 of RCRA that gives rise to -- that, if we improve, that the
8 violations gave rise to the damages that -- that we incurred
9 would be an appropriate application of negligence per se.

03:46PM 10 THE COURT: That's the minority decision, is that
11 correct?

12 MR. GEE: Yeah, I haven't fully briefed all -- all
13 of the cases on that issue.

14 THE COURT: But most of the cases that I have seen,
03:46PM 15 other than that one, come out the other way with some reasoning
16 that seems persuasive to me.

17 MR. GEE: Well, I guess, Your Honor, the -- some of
18 the cases that defendant -- defendants point to basically say,
19 the only RCRA remedy associated with RCRA is under
03:46PM 20 42 U.S.C. 6972. However, if we take a look at
21 42 U.S.C. 6972(f), it basically says nothing in this section
22 shall restrict the rights which any person shall have with
23 regard to -- with regards to common law and to seek enforcement
24 of any statutory standard or requirement.

03:47PM 25 THE COURT: But is that really the point for

1 determining whether or not this essentially establishes a
2 presumption of negligence per se? You can pursue other claims,
3 but that doesn't really bear on the issue that we're
4 discussing, does it?

03:47PM 5 MR. GEE: Well, Your Honor, I guess I can cite to,
6 you know, the purpose of RCRA which, if we take a look at
7 section 69 -- or 42 U.S.C. 6900, you know, when congress passed
8 RCRA, it basically says that it's meant to prevent damages --
9 I'm taking a look at (b) (14), essentially with open dumping of
03:47PM 10 particularly harmful -- or particularly harmful to health
11 and -- harmful and health contaminated drinking water from
12 underground --

13 THE COURT: I'm generally familiar with the purpose
14 of it. It's a strict liability statute; correct?

03:47PM 15 MR. GEE: That's correct.

16 THE COURT: And how does that affect the evaluation
17 as to whether this gives rise to a presumption of negligence
18 per se?

19 MR. GEE: Well, Your Honor, the -- by violating
03:48PM 20 RCRA, the -- you know, the defendants should be aware that
21 there are consequences and that --

22 THE COURT: From a doctrinal standpoint, the fact
23 that this is strict liability, does that cut in favor or
24 against a presumption?

03:48PM 25 MR. GEE: Um, I -- I guess I -- I don't understand

1 the issue.

2 THE COURT: Let me ask a different question, then.

3 Is there private right of action under RCRA?

4 MR. GEE: There is a prior right of action under the
03:48PM 5 citizens suit. However, as I mentioned, where we're not
6 talking about whether, you know, the plaintiffs can have a
7 prior right of action under RCRA, we're -- we're talking
8 about --

9 THE COURT: But you do recognize that there's a
03:49PM 10 strain of case law that says that, in looking to determine
11 whether statutory violation gives rise to a presumption, you do
12 take into account whether the violation would give rise to a
13 private right of action. There is law that stands for that
14 proposition; is that correct?

03:49PM 15 MR. GEE: I have not -- I have not looked at that.

16 THE COURT: All right. Let's move on, then.

17 If the Court concludes that RCRA doesn't give rise
18 to a presumption, that would apply to the California
19 counterpart. Would you agree with that?

03:49PM 20 MR. GEE: Yeah, basically one -- or they're mimics
21 of what -- of the same action.

22 THE COURT: And the same would be true with respect
23 to the federal and state counterpart for the Clean Water Act?

24 MR. GEE: Well, there's a Porter-Cologne Act which
03:50PM 25 is somewhat separate than what is available underneath the

1 Clean Water Act. The Clean Water Act basically -- basically
2 gives -- you know, protects navigable water. Porter-Cologne
3 Act actually has provisions that protect underground -- or
4 groundwater sources. And, you know, under the Porter-Cologne
03:50PM 5 Act 13304, and I -- I don't have it in front of me, but I
6 believe it's like (c) (5) -- that allows public entities to --
7 to basically recover costs associated with releases, associated
8 with contamination much in the sense -- same sense that the
9 Regional Water Quality Control Board can seek, you know,
03:51PM 10 basically to recover their damages associated with -- with
11 water contamination.

12 THE COURT: And let me have you respond to
13 Whittaker's brief with regard to the L.A. County ordinances.

14 MR. GEE: Well, the L.A. County ordinances should
03:51PM 15 not come as any surprise to Whittaker in the sense that the
16 L.A. County ordinance is -- basically prohibit the release and
17 disposal of noxious material that -- that can cause a nuisance.
18 And so, you know, that is a standard, that -- that prohibits
19 basically some of the activities that they did that resulted in
03:51PM 20 soil contamination and -- and the groundwater contamination.

21 THE COURT: What about their claim that they've been
22 prejudiced because you have not introduced any evidence -- and
23 maybe it's not even a matter of prejudice, it's a matter of
24 lack of proof -- about the appropriate standard of care or
03:52PM 25 whether there was, in fact, a violation of these ordinances?

1 MR. GEE: Well, Your Honor, the -- there are -- some
2 of the ordinances do require that before getting -- before
3 discharging waste, you need to get a permit.

4 THE COURT: Is there any evidence of permitting in
03:52PM 5 this case?

6 MR. GEE: There -- there is no -- there is no
7 evidence that they obtained a permit but, again --

8 THE COURT: Is there any evidence one way or the
9 other on that issue?

03:52PM 10 MR. GEE: Again, as Mr. Richard pointed out, we were
11 not entitled to provide -- to be given -- we asked for
12 evidence, and we were told that it was either lost or otherwise
13 unavailable.

14 THE COURT: All right. But is there any trial
03:52PM 15 evidence before this jury on the question of permitting?

16 MR. GEE: Um, again, we --

17 THE COURT: It's a yes or a no.

18 MR. GEE: No. No, there is not and --

19 THE COURT: So you're not entitled to this
03:53PM 20 instruction, then, are you? That's the Court's ruling. And
21 there's a long pause in response to the Court's question.

22 What about the other instruction, the other
23 ordinance, rather, 20.36.010? That's not the permitting. Is
24 there evidence that would support providing that ordinance as a
03:53PM 25 basis for a presumption of negligence per se?

03:54PM

1 MR. GEE: Well, the fact that it prohibits waste
2 materials from being disposed of in water bodies and surface --
3 well, let's see. Hang on a second. Well, it's much -- much in
4 the same way as -- as a prohibition against -- again, the
5 disposal and deposit of any waste material which may cause a
6 public nuisance or menace to public health. This does not
7 require a permit for this to be actionable and it's --

8 THE COURT: And --

9 MR. GEE: I'm sorry.

03:54PM

10 THE COURT: That's okay, Mr. Gee. I'm interrupting
11 you.

12 MR. GEE: Oh.

03:54PM

13 THE COURT: If I were to give this as a basis for a
14 presumption, is it -- is there any added value in giving any
15 other statute or law as a basis for a presumption in this case?

16 MR. GEE: Well, again, you know, this is just -- a
17 cause of action for which a -- a -- an act conducted by
18 Whittaker gives rise to damages associated with -- with
19 their release -- releases of contamination.

03:55PM

20 THE COURT: Let me put it another way. If the jury
21 were to conclude that you haven't proven this, you haven't
22 proven that Whittaker deposited any material which may create a
23 public nuisance or a menace to the public health or safety or
24 which may pollute underground or surface waters, then you're
25 going to lose. You're going to lose on negligence for sure,

1 let alone on this presumption issue; correct?

2 MR. GEE: If you're -- if -- if your question is
3 does the same evidence substantiate or support both nuisance --
4 nuisance and negligence per se, I would have to agree that they
03:55PM 5 do.

6 THE COURT: What I'm really driving at is, if I were
7 convinced to give this ordinance as a basis for the
8 presumption, is there any reason why I would give any other
9 statute or law as a basis for presumption? Because either the
03:56PM 10 jury would decide that this gives rise to that presumption of
11 negligence per se that you've proven this or not. There's no
12 other statute that you're relying upon that is going to affect
13 that.

14 That is to say, where they might say the plaintiff
03:56PM 15 hasn't proven a violation of 20.36.010 to give rise to a
16 presumption of negligence per se, but sure have proven a
17 violation of -- and you filled in the blank of the laundry list
18 of statutory violations that you've submitted. Am I correct or
19 incorrect on that?

03:56PM 20 MR. GEE: Can you rephrase -- rephrase the question?
21 I'm -- I don't --

22 THE COURT: Is there any other statutory violation
23 that you are offering that adds anything to this statute for
24 purposes of the negligence per se presumption instruction that
03:57PM 25 you're requesting?

1 MR. GEE: No, Your Honor. I guess it's -- it's --
2 for this one, it's -- it would give rise to, you know, other
3 tort claims.

4 THE COURT: So in other words, the jury couldn't
03:57PM 5 say, no, plaintiff hasn't proven 20.36.010's been violated, but
6 the plaintiff has proven -- you filled in the blank of all of
7 the other statutes that you want me to give as a basis for the
8 presumption. Am I right on that?

9 MR. GEE: For this particular statute, yes.
03:57PM 10 THE COURT: Are you satisfied if I decide -- I still
11 haven't heard from Whittaker. If I decide to give this as a
12 basis for the presumption, are you satisfied with my giving
13 just this one ordinance?

14 MR. GEE: Just this one single ordinance that --
03:58PM 15 THE COURT: Yes.

16 MR. GEE: L.A. County?
17 Um, no. Again, the Porter-Cologne Act does contain
18 a right of -- private right of recovery for public entities
19 like my client.

03:58PM 20 THE COURT: Tell me what it practically does,
21 Mr. Gee. Put yourself in the shoes of the jury.

22 MR. GEE: Okay.

23 THE COURT: And they're going to be listening to all
24 of these statutes.

03:58PM 25 MR. GEE: Okay.

1 THE COURT: And then argue it to the jury in your
2 own mind. How does it matter to the jury to have two, three,
3 or four different statutes that either largely say the same
4 thing, overlap to an extent? That's the point I'm driving at.

03:58PM 5 MR. GEE: Okay. Well, for instance, Your Honor,
6 let's say that we have -- that we have costs associated with
7 investigation for the release to groundwater under the
8 Porter-Cologne Act. We do have -- we do have as a public
9 entity the right to claim costs associated with that -- that is
03:59PM 10 not -- there are costs that are not covered by oversight
11 because, for example, DTSC --

12 THE COURT: Mr. Gee, either you're not understanding
13 me, respectfully, or I'm not understanding you, and I'm not
14 sure which is the case. But this is -- the jury's not going to
03:59PM 15 make a determination as to whether you violated statute A, B,
16 C, or D for purposes -- or whether Whittaker did for purposes
17 of this instruction. You're not going to know. Have you
18 provided the Court with any special verdict form that asks the
19 jury to come back and say they violated statute A, B, C, or D?
04:00PM 20 I'm not recalling that you did, but maybe I'm misremembering.
21 Did you?

22 MR. GEE: No. No, Your Honor.

23 THE COURT: So I return to the question that I asked
24 you. Is there any value, if I give a presumption of negligence
04:00PM 25 per se instruction, am I giving more than this one statute,

1 this one ordinance?

2 I'm going to let you confer with counsel, and I'll
3 hear from Mr. Blum.

04:00PM 4 MR. BLUM: Your Honor, is there anything specific

5 you want me to deal with?

04:01PM 6 THE COURT: This particular ordinance. I will tell

7 you that, Mr. Blum, that I'm looking to see if there's
8 prejudice here that I could find, not that I'm necessarily
9 looking for it or not looking for it. But because this is
10 purely a matter of law, I'm having a hard time seeing
11 prejudice, and that's why I'm focused on this particular
12 ordinance.

04:01PM 13 MR. BLUM: Well, Your Honor, it depends on how they
14 want to prove we did it. If they're going to argue, for
15 instance, that what we do was -- was a harm to public health,
16 we would have taken discovery on that, and it's a possibility
17 we would have retained an expert to say no.

04:01PM 18 THE COURT: But let's assume that they're not going
19 to argue that there was an actual injury to public health but,
20 rather, they're going to argue that under this ordinance, your
21 client was not permitted to pollute the underground or surface
22 waters and they did so here.

04:02PM 23 MR. BLUM: Well, Your Honor, if that's what their

24 argument is, I think that there's no evidence to support that
25 because there's no evidence we did.

1 THE COURT: Right. And in which case, you win on
2 this.

3 MR. BLUM: Well, in which case, if there's no
4 evidence, the instruction shouldn't even go to the jury.

04:02PM 5 THE COURT: Well, I understand that. But that goes
6 back to your motion --

7 MR. BLUM: Yes, I understand that.

8 THE COURT: So let's assume for purposes of this
9 discussion, because we're at jury instructions, that you're
04:02PM 10 going to lose on your JMOL.

11 MR. BLUM: Well, Your Honor, it's -- the statute
12 doesn't say you're not allowed to dispose of anything on the
13 ground. It says you're not allowed to pollute. So it's got to
14 mean something, the word "pollute." So, for instance, it
04:02PM 15 probably doesn't -- the example I would use -- it's the easiest
16 one -- is if we poured distilled water on the ground, that
17 wouldn't be in violation of the statute.

18 The difficulty with the statute is and where we
19 would actually focus on it is, at the time we did it, we -- we
04:03PM 20 were not polluting. For instance -- and why perchlorate, it's
21 not a big issue because everybody agrees that it wasn't until
22 1997 that there was a problem. We would have submitted more
23 evidence on the issue of what was known about TCE at the time
24 or whether or not we knew we were polluting or had reasonable
04:03PM 25 belief that we were polluting or all of those issues. But we

1 didn't even know this was an issue until halfway through this
2 trial.

3 THE COURT: What about the creating a public
4 nuisance portion of the ordinance?

04:03PM 5 MR. BLUM: Well, in order for there to be a public
6 nuisance, there has to be harm to the public which brings us
7 back to harm with health.

8 THE COURT: But there is a claim in this case of
9 public nuisance.

04:03PM 10 MR. BLUM: Yes. And we've asked for a JMOL because
11 one of the requirements of it is to show harm to public health.

12 THE COURT: But for purposes of whether you've been
13 prejudiced by the last minute introduction of this particular
14 instruction -- this ordinance, how can I find prejudice, if, in
04:04PM 15 fact, one of the bases of a public nuisance and that's a claim
16 in the case?

17 MR. BLUM: Because there's a difference between --
18 in our view, of a claim for public nuisance and negligence
19 per se. And the reason we're fighting so hard on the
04:04PM 20 negligence per se is because it -- what it tells the jury, you
21 don't have to find anything wrong. All you have to find is a
22 violation of this statute. And it's always a much easier pull
23 for a plaintiff than other causes of action.

24 We would have definitely, if we were confronting
04:04PM 25 this cause of action, have been able to bring in a

1 toxicologist. And, in fact, I think -- I believe a
2 toxicologist was on our original expert witness designation.
3 I'm not 100 percent sure, but I think it was. We decided not
4 to do it because of the way the case was structured.

04:05PM 5 THE COURT: And one last time, Mr. Blum, when this
6 indicates that, if you create a public nuisance, you're saying
7 that the prejudice here is that, even though you are facing a
8 public nuisance claim, that, because the negligence per se is
9 so much more of a concern to your client, that you would have
04:05PM 10 done more at this trial to address that point?

11 MR. BLUM: Yes, sir. And there's other issues -- I
12 mean, we would have dealt with the -- yes, sir.

13 THE COURT: All right. What about the other federal
14 claims that are being asserted as the predicate?

04:05PM 15 MR. BLUM: Your Honor, first of all, they can't just
16 put RCRA. They've got to tell us what section. We have the
17 right to know, when we go into closing, are we defending the
18 entire RCRA statute or sections of RCRA? And that they've
19 never told us.

04:06PM 20 THE COURT: Is Mr. Gee correct that RCRA can form
21 the predicate for --

22 MR. BLUM: No.

23 THE COURT: -- negligence per se?

24 MR. BLUM: RCRA is a very -- RCRA has a very limited
04:06PM 25 private right of action. It has procedural protections in it

04:06PM

1 such as the requirement of a 90-day notice. It has
2 limitations, what you have to prove to bring your action. And
3 then it has very limited remedies. That was the purpose behind
4 RCRA. It never was meant as a broad statute in which you can
5 bring -- basically get common law damages under. And this
6 would pervert the intent of RCRA.

7 Congress didn't write it this way, and I don't think
8 the state has the right to use it this way.

04:06PM

9 THE COURT: What about the -- the Porter-Cologne as
10 well as the Federal Clean Water Act?

11 MR. BLUM: Porter-Cologne Act does not -- the
12 Porter-Cologne does not provide for a private right of action
13 for plaintiff. I don't know what section -- this is another
14 thing. I have no idea what section they're talking about.

04:07PM

15 The one that is generally used I think is 133. That
16 area doesn't provide a private action except under the
17 circumstances in which the water board assesses penalties
18 against somebody, and then there's a private right of action to
19 seek contribution. That's not what we have here. And those
20 people that have the right to sue, my understanding is -- and I
21 limit this as I don't know what statute -- what section they're
22 going under. I'll -- I'll accept that I could be wrong.

04:07PM

23 The people that have the right to bring it are the
24 district attorneys of each county and the regional water boards
25 or the State Attorney General's Office. That's my

1 understanding of the people who have the right.

2 And again, give me the section. But you just
3 can't -- you just can't say Porter-Cologne Act. What's the
4 jury supposed to know? And there's -- and right now, the only
04:07PM 5 evidence we have in this case is from Mr. Hughto who didn't
6 even know the Porter-Cologne Act existed.

7 THE COURT: All right. Anything further on this
8 issue?

9 MR. BLUM: Um, no, Your Honor.

04:08PM 10 THE COURT: I'll hear, Mr. Gee, from you on the
11 Court's question. And I also will give you an opportunity to
12 respond to Mr. Blum's argument about prejudice here for the
13 reasons that he's mentioned.

14 MR. GEE: Your Honor, again, we don't think there is
04:08PM 15 any prejudice. I mean, this -- this is -- you know, a fairly
16 straight -- straightforward county ordinance that basically
17 says a person shall not discharge or cause discharge
18 something -- cause public nuisance or which may pollute
19 groundwater and surface water.

04:08PM 20 THE COURT: But what he argued was that, in light of
21 the significance of negligence per se, had he been made aware
22 that you were proceeding on this ground, that he would have
23 mounted a vigorous defense, including presenting evidence that
24 there was no public nuisance in a way that he hasn't. You
04:09PM 25 heard his argument.

1 MR. GEE: You mean hiring a toxicologist. Is
2 that --

3 THE COURT: Among other things.

4 MR. GEE: Okay. I don't think -- you know, I don't
04:09PM 5 think there would be any additional defenses that he has not
6 already raised that would -- that would -- would have caused
7 him to not be subject to this violation of the city ordinance.

8 THE COURT: And then what are the specific statutes
9 that you're relying upon? We're now moving past these two
04:09PM 10 ordinances which are specific. What specific statutes are you
11 relying on under every single ground that you're seeking to use
12 as a predicate for negligence per se?

13 MR. GEE: And, Your Honor, you know, again, if the
14 section -- citing for a specific section of RCRA, again, there
04:10PM 15 are just so many sections that were violated. And again, there
16 are -- there were -- are requirements that, once you close a
17 property, that you take proper action to implement a RCRA
18 corrective action -- corrective action plan. And there's the
19 evidence of -- you know, Mr. Alibrandi, president of Whittaker
04:10PM 20 Corporation, saying, well, I mean, he's being told by his
21 consultants that -- that there is this requirement and that
22 what he was planning on doing does not comply with RCRA.

23 THE COURT: But, Mr. Gee, I have to specifically
24 instruct the jury, and they have to have a specific predicate,
04:11PM 25 do they not, so that they can say, here's the law, specific

1 law, here's the evidence, was there a violation of that
2 specific law? The defendant is entitled to know what the
3 specific law is, not a large act like RCRA; correct?

4 MR. GEE: Yes. Your Honor, there are -- you know,
04:11PM 5 there are specific sections of the RCRA regulations that we --
6 that was clearly violated, and it's --

7 THE COURT: Have -- have you provided that to the
8 Court in the jury instructions? Because what I have is very
9 vague and general. It says, "RCRA gives EPA the authority to
04:11PM 10 control activities related to hazardous waste, including the
11 generation, transportation, treatment, storage, and disposal of
12 hazardous waste. Any violations of RCRA that were a
13 substantial factor in bringing about SCV Water's harm gives
14 rise to a claim for negligence per se."

04:12PM 15 I don't know as a judge what I would do with that
16 precisely. What is the jury to do with that?

17 MR. GEE: Well, we can cite to the EPA notice of
18 violation for which Whittaker was well aware that occurred back
19 in the late 1980s as -- as evidence of the violations that --
04:12PM 20 of RCRA that they -- that they knew of.

21 THE COURT: And what specific act was violated in
22 that circumstance that the jury can consider?

23 MR. GEE: Well, brought in evidence that, you know,
24 groundwater monitoring was not implemented, for instance.

04:12PM 25 THE COURT: Have you given the Court the specific

1 law and have you given Whittaker the specific law under RCRA
2 that has been violated? Yes or no, please.

3 MR. GEE: No. We did not list that in the jury
4 instruction.

04:12PM 5 THE COURT: Did you do that with regard to any law
6 other than the two ordinances of L.A. County? Did you do that
7 for any federal or state law that you have provided other than
8 the two L.A. County ordinances?

9 MR. GEE: For Porter-Cologne Act, we did cite to
04:13PM 10 1334 -- 13304.

11 THE COURT: You did. Anything else?

12 MR. GEE: Actually, I'd have to take a look, but
13 there was some NPDES violations, and I may have cited to the
14 specific provisions associated with the NPDES violations. I'll
04:13PM 15 have to look, though.

16 THE COURT: And so answer the question if you -- if
17 you don't mind, that the Court asked you before you -- you sat
18 down and consulted with Mr. Richard. Are you asking the Court
19 for an instruction with every single one of these predicates or
04:13PM 20 something less?

21 MR. GEE: Um, we would probably withdraw the
22 permit -- the county permit violation because we don't have
23 evidence as to whether or not they applied for a permit and --
24 and obviously -- would bother me, though, that we couldn't
04:14PM 25 produce evidence of a permit because we didn't get evidence --

1 THE COURT: That's a discovery issue; right?

2 MR. GEE: Yes.

3 THE COURT: All right. We're at trial, please,

4 Mr. Gee.

04:14PM 5 MR. GEE: Yes. Other than that, Your Honor, I -- I
6 think that there's -- there's plenty of evidence that -- that
7 there are violations of -- of RCRA. We didn't cite to a
8 specific provision. We did cite to a specific provision of the
9 Porter-Cologne Act, as I recall.

04:14PM 10 THE COURT: All right. I'm going to take this
11 matter under submission. I will tell you, I'm -- I am
12 concerned about how this matter was presented by the plaintiff.
13 This is an important issue. All counsel understood that from
14 the outset. Negligence per se is a significant issue when
04:15PM 15 you're trying to prove negligence, especially in a case like
16 this where you're dealing with standards of care and activities
17 that go back a long way.

18 It seems to me it does require care from counsel to
19 be very specific and to provide the information in a timely way
04:15PM 20 to both the other side, Whittaker, as well as to the Court.
21 And I do have serious concerns about how this is presented.

22 But I'm going to take a further look at this, and
23 you'll have the Court's ruling on it, obviously if not tonight,
24 by tomorrow morning.

04:15PM 25 MR. GEE: Thank you, Your Honor.

04:16PM

1 THE COURT: And so you're going to have to
2 proceed -- Mr. Richard, you may not get a ruling until tomorrow
3 morning. You're going to have to unfortunately have a plan A
4 and a plan B with regard to this portion of your slide deck,
5 assuming you're using a PowerPoint.

6 MR. RICHARD: Understood. Are we -- do I have time
7 to make my motion on the cross-complaint?

8 THE COURT: Of course you do. Yes.

04:16PM

9 MR. RICHARD: I think I can share with the Court
10 that, when I met and conferred briefly with Mr. Blum on this
11 issue, he said he had not been thinking about whether he had a
12 cross-complaint. But there are seven claims, two of which
13 arguably could go to the jury. One for negligence, and that's
14 claim 7, and -- and I think the other was contribution.

04:16PM

15 So there's been no evidence of harm. And as I stand
16 here, I don't know if Whittaker's intending to pursue it. But
17 the record should be clear because at the outset the Court
18 instructed the jury that there were cross-claims. And I don't
19 want to be surprised and have Mr. Blum argue cross-claims
20 tomorrow in front of the jury and expect to have a final
21 closing argument so --

22 THE COURT: Let me do this. Let me ask Mr. Blum
23 what his position is so this way you actually have a target
24 that matters.

04:17PM

25 All right.

1 MR. BLUM: Your Honor, may I have one second?

2 THE COURT: Yes.

3 (Pause in the proceedings.)

4 MR. BLUM: Just a second, Your Honor.

04:18PM 5 Your Honor, right this moment I'm in a little
6 ethical quandary. I can't agree to dismiss it because I need
7 the client's permission.

8 THE COURT: Understood.

9 MR. BLUM: So --

04:18PM 10 THE COURT: Tell me within -- within those
11 boundaries what you anticipate, and this will not bind you or
12 Whittaker.

04:18PM 13 MR. BLUM: I had not -- I did not intend to argue
14 that -- I intend to argue they're negligent but not that we are
15 damaged as a result. Other than the -- that we have to pay
16 more for the cleanup as -- which is different in my mind.

04:19PM 17 THE COURT: All right. So let me -- thank you. Let
18 me hear from Mr. Richard as to where that leaves you with
19 regard to your -- your motion. And if this is of any help to
20 you, I will indicate that you have preserved your -- your
21 rights with regard to making a motion to their entire
22 cross-complaint.

23 MR. RICHARD: Thank you, Your Honor.

04:19PM 24 As a practical matter, I was focused on the
25 potential claims that could go to the jury, and the 7th claim

1 is for negligence. Plaintiff owed a duty and then as a --
2 paragraph 34 of the cross-complaint as a -- or counter-claim,
3 as a direct and proximate result of plaintiff's negligence,
4 Whittaker has been damaged in an amount according to proof.

04:19PM 5 Well, there is no proof. So that's -- that's an easy one.

6 The fifth counter-claim against counter-defendant,
7 contribution at line 7, after alleging to the extent Whittaker
8 may have any liability, quote, "Plaintiff is liable to
9 Whittaker for contribution for all costs to the extent that
04:20PM 10 Whittaker might have liability to a nonparty."

11 Again, there's just no evidence of harm, and so I
12 don't believe there's any issue. And also, it's probably been
13 waived because there are no questions in the verdict form that
14 was submitted months ago and has been worked on. So it is out
04:20PM 15 of an abundance of caution that I want to address this now and
16 not be surprised.

17 THE COURT: All right. Mr. Blum, how would you
18 suggest we proceed?

19 MR. BLUM: If counsel can give me three hours after
04:20PM 20 we get out of here, my -- I will probably be able to resolve
21 the problem. Considering where we are, I'm sure the Court is
22 able to rule tomorrow morning if I don't get the answer I
23 expect.

24 THE COURT: That's fine. So I'll defer ruling until
04:20PM 25 I know that it is a disputed issue.

1 I am going to order the parties to be here tomorrow
2 at 7:30 because I'm going to provide you with the -- with the
3 jury instructions. I can see sad looks on faces.

04:21PM 4 Let's go off the record for a moment to discuss

5 this.

6 Off the record.

7 (Off-the-record discussion.)

8 THE COURT: Back on the record.

04:24PM 9 So the parties are ordered back tomorrow at
10 8:00 o'clock. And with regard to the PowerPoint presentations
11 that each counsel intends to use, we had an off-the-record
12 discussion where I indicated that I would like to receive
13 tomorrow morning a copy of your respective PowerPoint
14 presentations. However, both counsel agreed not to have
04:25PM 15 their -- their own PowerPoint shared with the other side, which
16 is agreeable to the Court.

17 So the parties will be providing me an ex parte
18 communication of their PowerPoints.

19 Also, Mr. Blum indicated that I may not be getting
04:25PM 20 the final version of his PowerPoint to the limited extent that
21 he's making changes in the course of hearing Mr. Richard's
22 closing argument, and that's fine. But I expect that I'm going
23 to get the version that is the final version other than
24 whatever changes that you are contemporaneously making.

04:25PM 25 Let me make sure that I have accurately stated what

1 was materially stated off the record and agreed upon.

2 Mr. Richard?

3 MR. RICHARD: Yes, Your Honor, you have.

4 THE COURT: Mr. Blum?

04:26PM 5 MR. BLUM: That's correct, Your Honor.

6 THE COURT: All right. Then is there anything
7 further that we have to discuss before we conclude?

8 Since you're standing, I'll go with you first,
9 Mr. Blum, then Mr. Richard.

04:26PM 10 MR. BLUM: First, Your Honor, after plaintiff does
11 their small part of Mr. Dawson's --

12 THE COURT: Use the microphone if you would, please.

13 MR. BLUM: After plaintiff reads -- does the small
14 portion of Mr. Dawson's tomorrow, I would like -- if I could do
04:26PM 15 it in advance, we have to make a directed verdict motion based
16 on the issues we've also already raised in the JMOL.

17 THE COURT: All right. That's fine. Why don't we
18 do this. So this is for your anticipating possibly a 50(b)
19 motion. Is that what you're --

04:26PM 20 MR. BLUM: I believe that's the section, Your Honor.

21 THE COURT: All right. And so procedurally,
22 Mr. Richard, do you have any objection if -- if that is done
23 after closing arguments?

24 MR. RICHARD: Not at all, Your Honor.

04:27PM 25 THE COURT: All right. Is that agreeable, Mr. Blum?

1 MR. BLUM: That's fine. I do also have one other
2 question, Your Honor.

3 THE COURT: Yes.

4 MR. BLUM: I don't want to have to interrupt
04:27PM 5 Mr. Richard, and I know -- and I don't want him to interrupt
6 me. But what I would like to be able -- so I don't want to
7 have to make the argument during his closing that the facts
8 don't support the argument. And I would like those issues to
9 be preserved so that we're not -- and also, that any issue
04:27PM 10 raised by us in the JMOL is deemed raised as it relates to the
11 closing argument. Otherwise, I'm in a really tough position
12 when I would -- and I'm actually making this -- it benefits the
13 plaintiff.

14 THE COURT: I'm not sure really what it is that
04:27PM 15 you're asking. If you're asking essentially that you preserve
16 all objections to anytime that the other side has arguably
17 strayed from the trial evidence, I'm not sure how that would
18 practically work.

19 MR. BLUM: Well, Your Honor, we have -- the two of
04:28PM 20 us have a very different view of some of the evidence. Either
21 I have to object to his closing, which most likely is going to
22 get annoying to everybody, including myself, on those grounds
23 or they're preserved and if -- if I have to appeal, that I
24 don't want to be -- I don't want the argument back that I've
04:28PM 25 waived that argument.

1 THE COURT: I'm not sure how you're going to be able
2 to proceed in that fashion.

3 MR. BLUM: Well, I've done it before, Your Honor.
4 And what we agree with the Court's consent that objections as
04:28PM 5 to -- that the evidence doesn't support the argument are
6 preserved and don't have to be made at the time of the argument
7 but could be made after the argument.

8 THE COURT: And give me the appellate argument that
9 results from that because you're taking me out of the equation
04:29PM 10 here.

11 MR. BLUM: Not intentionally, Your Honor. But
12 what -- for instance, if he makes an argument and the appellate
13 Court says, yes, it was wrong but you didn't object to it at
14 the time of closing, therefore, you waived it.

04:29PM 15 THE COURT: I understand that. But practically
16 speaking, your argument is going to be that there was
17 insufficient evidence to support the verdict if it's an adverse
18 verdict. And you have filed a JMOL and have renewed it at the
19 close of your case. So tell me where the daylight is between
04:29PM 20 those two points.

21 MR. BLUM: Your Honor, this is just what I've done
22 pretty much every case I've tried --

23 THE COURT: All right. I don't think I'm going to
24 agree to that because I don't understand the consequences of
04:29PM 25 it. So if you think that you need to stand up and object every

1 time, I'm not sure that you need to do so from an appellate
2 standpoint, but I can't make that determination for you.

3 I have never seen what you're suggesting, and I've
4 been doing this for a while as well. And if you could explain
04:30PM 5 to me the practical significance of it, then perhaps I will
6 reconsider. But otherwise, I think we -- we have a respective
7 job to do.

8 If you believe that the -- that Mr. Richard is not
9 arguing either from the evidence or reasonable inferences from
04:30PM 10 the evidence, then presumably you're going to object. And
11 if -- that's different, it seems to me, than saying that the
12 evidence doesn't potentially support the verdict.

13 So I'm just not really tracking what you're
14 requesting, and so I'm reluctant to do it.

04:30PM 15 MR. BLUM: That's fine, Your Honor.

16 THE COURT: All right. We are in recess until --
17 actually, Mr. Richard, I don't know that I gave you an
18 opportunity.

19 MR. RICHARD: I was just thinking about our
04:30PM 20 discussion before opening statement, Your Honor, where similar
21 concerns were raised. And the only argument in opening
22 statement, as I reread it, was from Mr. Blum repeatedly, and I
23 didn't object.

24 So, you know, I can't sit here and hear that he's
04:31PM 25 concerned I'm going to do something inappropriate without at

1 least saying I think he's worried about the wrong orator.

2 THE COURT: I didn't hear him to suggest that.

3 Here's what I heard him to say, for whatever it's worth, is
4 that your whole argument is going to be improper because you
04:31PM 5 can't argue that you're entitled to a verdict because you
6 haven't presented any evidence that would support a verdict.

7 Have I gotten that right, Mr. Blum?

8 MR. BLUM: Generally, yes, sir.

9 THE COURT: Pretty close.

04:31PM 10 All right. We're in recess. Have a good evening.

11 MR. RICHARD: Thank you.

12 (Proceedings adjourned at 4:31 p.m.)

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2018

CERTIFICATE OF OFFICIAL REPORTER

COUNTY OF LOS ANGELES)
STATE OF CALIFORNIA)

6 I, MYRA L. PONCE, FEDERAL OFFICIAL REALTIME COURT
7 REPORTER, IN AND FOR THE UNITED STATES DISTRICT COURT FOR THE
8 CENTRAL DISTRICT OF CALIFORNIA, DO HEREBY CERTIFY THAT PURSUANT
9 TO SECTION 753, TITLE 28, UNITED STATES CODE THAT THE FOREGOING
10 IS A TRUE AND CORRECT TRANSCRIPT OF THE STENOGRAPHICALLY
11 REPORTED PROCEEDINGS HELD IN THE ABOVE-ENTITLED MATTER AND THAT
12 THE TRANSCRIPT PAGE FORMAT IS IN CONFORMANCE WITH THE
13 REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES.

DATED THIS 2ND DAY OF DECEMBER, 2021.

/S/ MYRA L. PONCE

MYRA L. PONCE, CSR NO. 11544, CRR, RDR
FEDERAL OFFICIAL COURT REPORTER

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